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No. 74-1435

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1975

The Environmental Protection Agency, et. al.,
Petitioners

vs.

People of the State of California ex rel. State Water Resources Control Board and State of Washington, et al.,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR STATE OF WYOMING, AMICUS CURIAE, IN SUPPORT OF RESPONDENTS.

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INDEX

Pages

QUESTION PRESENTED 1

INTEREST OF STATE OF WYOMING 2

ARGUMENT:

The Ninth Circuit Court of Appeals correctly held that federal facilities must comply with the requirement of state permit programs under Section 313 of the Federal Water Pollution Control Act Amendments of 1972. 3

I. The Plenary Powers Clause, Article I, Section 8, Clause 17, does not prohibit the imposition of a federal requirement that federal agencies obtain state permits 3

II. Unless the term "requirement" includes state permit programs, the purposes and objectives of the Federal Water Pollution Control Act Amendments of 1972, will be defeated 5

III. The Environmental Protection Agency's construction of Section 313 is not entitled to any weight in construing Section 313 7

CONCLUSION 10

TABLE OF CITATIONS

CASES

Alexander v. Cosden Pipe Lines Co., 290 U.S. 484 (1934) 7

Davies Warehouse Co. v. Bowles, 321 U.S. 144 (1944) 8

	Pages
Estate of Sanford v. Commissioner, 308 U.S. 39 (1939)	8
Evans v. Cornman, 398 U.S. 419 (1970)	5
Federal Maritime Commission v. Seatrain Line, Inc., 411 U.S. 726 (1973)	8
Harris v. Bell, 254 U.S. 103 (1920)	8
Houghton v. Payne, 194 U.S. 88 (1904)	8
Iselin v. United States, 270 U.S. 245 (1926)	7
Merritt v. Cameron, 137 U.S. 542 (1890)	7
Norwegian Nitrogen Products Co. v. United States, 288 U.S. 299 (1933)	7
Offut Housing Co. v. Sarpy County, 351 U.S. 253 (1956)	5
Paul v. United States, 371 U.S. 245 (1965)	5,6
Red Lion Broadcasting Co. v. Federal Communications Commission, 395 U.S. 367 (1968)	7
United States v. Missouri P.R. Co., 278 U.S. 269 (1929)	8
United States v. Shreveport Grain & Elevator Co., 287 U.S. 77 (1932)	7
Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission, 390 U.S. 261 (1968)	8

CONSTITUTION, STATUTES AND REGULATIONS

	Pages
United States Constitution: Art. I, Sec. 8, cl. 17 (Plenary Powers Clause)	3
Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816 **et seq.** 33 U.S.C. 1251 **et seq.** (Supp. III 1973)	
Sec. 101(a), 33 U.S.C. 1251(a)	9
Sec. 101(b), 33 U.S.C. 1251(b)	6,9
Sec. 313, 33 U.S.C. 1323	3,4
Sec. 402, 33 U.S.C. 1342	4
Sec. 402(b), 33 U.S.C. 1342(b)	2
Sec. 502(17), 33 U.S.C. 1362(17)	6
40 C.F.R.:	
Sec. 124.44	6
Sec. 125.2(b)	7
Sec. 125.11(b)	6
Sec. 125.23	6

CONGRESSIONAL:

S. Rep. No. 92-414, 92nd Cong., 1st Sess. (1971)	9

OTHER

Wyoming Statutes, 1957, § 35-502.2 (Cum. Supp. 1975)	2
40 Fed. Reg. 27925, 27928	10
Executive Order No. 11752, 3A C.F.R. 240, 38 F.R. 34793 (December 19, 1973)	8

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AMICUS CURIAE BRIEF OF THE STATE OF WYOMING IN SUPPORT OF RESPONDENTS.

QUESTION PRESENTED

Whether federal agencies must obtain and comply with water quality control permits issued by the states under the Federal Water Pollution Control Act of 1972. 33 U.S.C. §§ 1251-1376.

INTEREST OF THE STATE

The State of Wyoming, in addition to other goals in the Wyoming Environmental Quality Act, seeks:

> to preserve and exercise the primary responsibilities and rights of the State of Wyoming; to retain for the State control over its air, land and water and to secure cooperation between agencies of the State, agencies of other states, interstate agencies, and the federal government in carrying out these objectives. (§ 35-502.2, Wyoming Statutes, 1957, 1975 Cum. Supp.)

In furtherance of such goals, the State of Wyoming has entered into a "Memorandum Agreement" with the United States Environmental Protection Agency. This agreement transferred primary responsibility for the operation of the National Discharge Elimination System Permit Program (hereinafter "NPDES Program") to the State of Wyoming. The agreement took effect on January 30, 1975, upon prior program approval by the Administrator of the Environmental Protection Agency pursuant to Section 402(b) of the Federal Water Pollution Control Act. (33 U.S.C. 1342(b)). Paragraph 5 of the "Policies" section of the Memorandum Agreement provides:

> Region VIII of the Environmental Protection Agency, with technical assistance from [Water Quality] Division [of the Wyoming Department of Environmental Quality] shall have the responsibility for issuance of NPDES permits for point source discharges from Federal facilities to include point sources controlled by Indian Tribes or authorized by Indian Tribal organizations.

Execution of the Memorandum Agreement was a prerequisite for the State of Wyoming to assume primary responsibility for the NPDES program and thereby achieve the goals of the Wyoming Environmental Quality Act. However, the ability to assume full responsibility for the program and

to achieve the states' goals is impaired by Paragraph 5 of the Memorandum Agreement and the legal uncertainty of state authority over federal facilities under the Federal Water Pollution Control Act.

ARGUMENT

THE NINTH CIRCUIT COURT OF APPEALS CORRECTLY HELD THAT FEDERAL FACILITIES ARE REQUIRED TO COMPLY WITH STATE PERMIT REQUIREMENTS FOR WATER POLLUTION CONTROL UNDER THE FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972.

The primary issue involves the meaning of Section 313 of the Federal Water Pollution Control Act of 1972 (the "Water Act"), 33 U.S.C. §§ 1251-1376, which provides that federal agencies "shall comply with Federal, **State**, interstate, and local **requirements** respecting control and abatement of pollution **to the same extent that any person is subject to such requirements**, including the payment of reasonable service charges." § 313 (33 U.S.C. § 1323) (emphasis added).

I. THE PLENARY POWERS CLAUSE, ARTICLE I, SECTION 8, CLAUSE 17, DOES NOT PROHIBIT THE IMPOSITION OF A FEDERAL REQUIREMENT THAT FEDERAL FACILITIES OBTAIN STATE PERMITS.

The Act itself provides no definitive meaning of the "requirements" with which federal agencies are directed to comply. Petitioner asserts here, as it did below, that the requirements to be complied with are a state's substantive effluent limitations and other standards, including schedules of compliance. (Petitioner's brief, p. 13). **Amicus** urges that the Ninth Circuit correctly interpreted the "requirements" of Section 313 to include compliance with state permit programs.

Petitioner argues that such a construction of Section

313 runs afoul of the Plenary Powers Clause, Art. I, § 8, cl. 17. **Amicus** contends that exclusive federal jurisdiction over federal enclaves has been waived by the Water Act; and that such waiver extends to state permit authority over federal enclaves as well as compliance with state substantive standards.

From one perspective, the question here does not present a case of state infringement on federal jurisdiction. In this context, the states cannot be seen as spontaneously intermeddling with federal activities. If the states are found to have been granted permit authority over federal facilities, the states would after all only be applying standards which by **federal** law must conform to **federal** minimums.

Petitioner's real objection appears to be the perceived unseemliness of federal facilities applying for a state permit. However, the state permit programs, in order to be approved, were carefully scrutinized by a federal agency and must conform to federal requirements. Section 402 (33 U.S.C. § 1342). In addition, there is still available an executive exemption, if it is felt that a federal facility's compliance with federally mandated standards is not appropriate. Section 313 (33 U.S.C. § 1323). In sum, the spectre raised by Petitioner, should states be allowed to exercise this permit authority, falls considerably short of state control over a federal facility.

However, since all agree that federal facilities must comply with state substantive standards, plainly the Water Act contains some sort of waiver of exclusive of federal jurisdiction. The objection of Petitioner goes to the scope of the waiver.

Petitioner states:

> Congress can affirmatively waive federal immunity from state regulation but in view of this traditional and constitutional division of powers between the federal government and the states, any such congressional waiver must be clear, unambiguous and **unequivocal**.

(Petitioner's brief p. 13) (emphasis added).

However, this Court has allowed such state regulation where the statutory language involved was less than clear.

In **Offut Housing Co. v. Sarpy County**, 351 U.S. 153 (1956), the Plenary Powers Clause was advanced as a bar to state taxation of a lessee of federal property. This Court permitted the state tax even though Justice Frankfurter observed that "This is one of those cases in which Congress has seen fit **not to express itself unequivocally**." 351 U.S. at 260 (emphasis added). By providing that federal facilities shall comply with state requirements "to the same extent that any person is subject to such requirements," the fact of waiver is clear. All that remains is the scope of this waiver.

As recently noted by this Court, "Congress has now permitted the states to extend important aspects of state powers over federal areas." **Evans v. Cornman**, 398 U.S. 419, 423 (1970). **Amicus** contends that congressional permission for the states to exercise permit authority over federal areas has been granted by the Federal Water Pollution Control Act.

II. UNLESS THE TERM "REQUIREMENTS" INCLUDES STATE PERMIT PROGRAMS, THE PURPOSES AND OBJECTIVES OF THE ACT WILL BE DEFEATED.

Petitioner concedes that federal facilities must comply with a state's substantive standards and limitations. Further, Petitioner states that federal facilities must conform to state schedules of compliance. In short, according to Petitioner, a federal facility must comply with virtually every state requirement except the permit procedure. However, without permit authority, the goals of the Act are frustrated and the states' position is untenable.

This Court has noted, in speaking of the federal-state relationship, that if federal policy is to be subject to state interests and regulation, "we can only believe that the objectives of the Act would have been differently stated." **Paul v.**

United States, 371 U.S. 245 260 (1965). However, one of the expressed goals of the Water Act is to "recognize, preserve, and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution. . ." Section 101(b) (33 U.S.C. § 1251 (b)). **Amicus** submits that without permit authority, the states cannot effectively assume their congressionally-imposed responsibilities under the Act.

Perhaps the most demonstrable difficulty with the role of the states as urged by Petitioner is the effectiveness of compliance schedules. A compliance schedule is not an analytically pure concept in the substantive-complaince/procedural-noncompliance dichotomy advanced by Petitioner. As defined by the Water Act, a compliance schedule is "a schedule of remedial measures leading to compliance with an effluent limitation, other limitation, prohibition, or standard." Section 502 (17) (33 U.S.C. §1362 (17)).

As witnessed by the regulations promulgated pursuant to the Water Act, compliance schedules are an integral part of the permit procedure and, indeed, are contained in the permits issued. Under a subpart labeled "Terms and Conditions of NPDES Permits" and in a section titled "Schedules of compliance **in issued NPDES permits**," (emphasis added) the regulations provide:

> . . . any State or interstate agency participating in the NPDES shall follow the following procedures in **setting schedules in NPDES permit conditions** to achieve compliance with applicable effluent standards and limitations, water quality standards, and other applicable requirements. . ." (emphasis added) 40 C.F.R. § 124.44. **See also**, 40 C.F.R. § 125.23.

Of necessity, compliance schedules are formulated ad hoc and need prepermit input for their determination. **See**, 40 C.F.R. § 125.11(b).

The analytical inconsistency of Petitioner's position is completely overshadowed by the impossibility of its implementation. How can a state compliance schedule be formulated, complied with, or enforced with regard to federal facilities if the state is not the permit authority? Absent the application of state permit programs to federal facilities, the conceded applicability of state compliance schedules to federal facilities becomes meaningless.

III. THE ENVIRONMENTAL PROTECTION AGENCY'S CONSTRUCTION OF SECTION 313 IS NOT ENTITLED TO ANY WEIGHT IN CONSTRUING SECTION 313.

E.P.A.'s regulations implementing the Water Act provide that state permit programs approved by the E.P.A. Administrator "do not cover agencies and instrumentalities of the Federal government. . . ." 40 C.F.R. § 125.2(b). The Petitioner argues that E.P.A.'s construction of the statute "should be followed unless there are compelling indications that it is wrong. . ." **Red Lion Broadcasting Co. v. Federal Communications Commission**, 395 U.S. 367, 381 (1968). Application of this salutory principle is inappropriate in the instant case since the administrative interpretation is not of longstanding duration, is inconsistent with the statutory mandate, and frustrates the express Congressional policy.

The rule of judical deference to administrative interpretations of a statute is not strictly applied where such interpretation is not of a continuous or longstanding nature. As stated by this Court in **Merrit v. Cameron**, "construction of a statute by a department charged with its execution [is not] to be held conclusive and binding upon the courts of the country, **unless such construction has been continuously in force for a long time**." 137 U.S. 542, 552 (1890) (emphasis added); Iselin v. United States, 270 U.S. 245 (1926); United States v. Shreveport Grain & Elevator Co., 287 U.S. 77 (1932); Norwegian Nitrogen Products Co. v. United States, 288 U.S. 299 (1933); Alexander v. Cosden Pipe Line Co., 290 U.S. 484 (1934). Where, as in the instant case, the administrative construction "was no sooner made than challenged," this Court has avoided applying the rule of

judical deference, since the administrative construction was very likely determined by the same considerations as are now put forward in its defense. Davies Warehouse Co. v. Bowles, 321 U.S. 144, 156 (1944). Similarly, reliance upon Executive Order 11752, as requiring the upholding of the administrative construction of Section 313, would allow administrative and executive considerations to determine the meaning of the statutory language. 38 F.R. 34793 (December 19, 1973), 3A C.F.R. 1973 Comp. 240. Executive Order 11752 should be given little weight since it was issued more than four months **after** the instant suit was filed, creating the inference that it was issued in response to the suit fo the purpose of lending credence to E.P.A.'s position.

Furthermore, the rule of judicial deference to an administrative construction is only a rule of interpretation, and neither is it an absolute rule nor does it preclude an inquiry by the courts as to the original correctness of such construction. Houghton v. Payne, 194 U.S. 88 (1904). While the interpretation given a statute by the administering agency is entitled to considerable weight, it is not conclusive and the courts are not bound by it. Harris v. Bell, 254 U.S. 103 (1920); United States v. Missouri P.R. Co., 278 U.S. 269 (1929); Estate of Sanford v. Commissioner, 308 U.S. 39 (1939); Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission, 390 U.S. 261 (1968), **amended on other grounds**, 392 U.S. 901 (1968); Federal Maritime Commission v. Seatrain Lines, Inc., 411 U.S. 726 (1973). As this Court has frequently said:

> But the courts are the final authorities on issues of statutory construction, F.T.C. v. Colgate-Palmolive Co., 380 U.S. 374, 385, 13 L.Ed. 2d 904, 914, 85 S.Ct. 1035, and 'are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.' NLRB v. Brown, 380 U.S. 278, 291, 13 L.Ed. 2d 839, 85 Ct. 980. Volkswagenwerk Aktiengesellschaft v. F.M.C.,

> 390 U.S. 261, 272 (1968) (quoted in F.M.C. v. Seatrain Lines, 411 U.S. 726 (1973)).

The statutory mandate of the Water Act "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." § 101(a) (33 U.S.C. § 1251(a)). Congress also clearly expressed its policy; of placing primary responsibility for achieving this objective upon the states.

> It is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this Act. § 101(b) (33 U.S.C. § 1251(b)).

E.P.A.'s administrative construction of Section 313 clearly detracts from the Congressional mandate by allowing federal facilities to avoid state supervision and control. One of the preceived deficiencies which the Water Act was designed to correct was the failure of the federal government to lead the way in eliminating water pollution. In this regard, the committee report accompanying S. 2770, contained a brief discussion of Section 313:

> This section would require every Federal agency with control over any activity or property to provide national leadership in the control of water pollution in such operations. . . .Lack of Federal leadership has been detrimental to the water pollution control effort. The Federal Government cannot expect private industry to abate pollution if the Federal Government continues to pollute. This section requires that Federal Facilities meet all control requirements as if they were private citizens.
>
> Report of the Senate Committee on Public Works, S. Rep. No. 92-414, 92nd Cong., 1st Sess. 67 (1971).

Petitioner relies upon the comments of the Administrative Conference of the United States in arguing that affirmance of the Court of Appeals in the instant case will create an administrative nightmare for federal facilities. The Conference's full statement, in fact, recognizes that a reversal of the lower court decision will "leave only the present fragmentary and ineffective federal procedures to ensure the compliance of federal facilities with environmental quality standards." 40 F.R. 27925, 27928 (July 2, 1975). Under the Conference's analysis, the present administrative construction of Section 313 enables federal facilities to continue the unresponsive course pursued by them prior to the Water Act.

The administrative construction of Section 313 is entitled to no weight since it is inconsistent with the statutory mandate to eliminate pollution and frustrates the congressional policy of placing the primary responsibility on the states to prevent, reduce and eliminate pollution.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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